Supreme Court, U.S.
FILED

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In the
Supreme Court of the United States
October Term, 1996

In the Matter of the Medical License
of Robert W. Tatreau, M.D.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF MINNESOTA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the Minnesota Board of Medical Practice deny Petitioner, Robert W. Tatreau, M.D., due process by disciplining him solely on the grounds that he surrendered his medical licenses in California and Colorado, without affording him a meaningful opportunity to contest the factual allegations against him in California and Colorado?

II. Did the Minnesota Board of Medical Practice deny Petitioner, Robert W. Tatreau, M.D., due process by disciplining him without affording him a meaningful opportunity to present mitigating evidence and testimony?

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Robert W. Tatreau, M.D. ("Dr. Tatreau"), represented by Andrew S. Birrell, Birrell & Dunlap, 2450 Park Avenue, Minneapolis, MN 55404, (612) 871-7000.

The Minnesota Board of Medical Practice ("Medical Board"), represented by Hubert H. Humphrey, III, Attorney General, State of Minnesota, David E. Flowers and Mary L. Stanislav, Assistant Attorneys General, 525 Park Street, Suite 500, St. Paul, MN 55103 (612) 297-1050.

OPINIONS BELOW

This Petition for Certiorari arises from an Order of the Minnesota Supreme Court dated December 17, 1996, denying review of a decision of the Minnesota Court of Appeals in this matter, dated October 22, 1996. The Court of Appeals' decision affirmed the final order of the Minnesota Board of Medical Practice, dated May 20, 1996, which reprimanded Dr. Tatreau and imposed restrictions on his medical license.

JURISDICTION

The decision of the Minnesota Supreme Court from which Dr. Tatreau petitions for certiorari is dated December 17, 1996. Jurisdiction of this Honorable Court is invoked under Title 28, U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

Amendment V, United States Constitution:

"No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

STATE STATUTE INVOLVED

Minnesota Statute, Section 147.091, Subdivision 1(d):

"The following conduct is prohibited and is grounds for disciplinary action:

. . . (d) Revocation, suspension, restriction, limitation, or other disciplinary action against the person's medical license in another state or jurisdiction . . . ."

STATEMENT OF THE CASE

Petitioner, Robert W. Tatreau, M.D., is a physician licensed to practice medicine in the State of Minnesota. He previously was licensed in California and Colorado. In September of 1988, Dr. Tatreau moved to Minnesota and established a medical practice. In 1989, Dr. Tatreau voluntarily surrendered his medical licenses in California and Colorado. At the time Dr. Tatreau surrendered his California and Colorado licenses, accusations had been filed against him for gross negligence and unprofessional conduct in those jurisdictions.

In November of 1989, the Minnesota Board of Medical Practice's Complaint Review Committee ("CRC") began investigating the underlying allegations that formed the basis of the California and Colorado accusations. On January 12, 1996, six years after commencing investigation, the CRC filed a notice and order for a contested case hearing against Dr.

Tatreau. The notice alleged Dr. Tatreau was subject to discipline in Minnesota, not on the basis of his professional conduct in any jurisdiction, but due solely to his decision to surrender his medical licenses in California and Colorado while under investigation for allegations of professional malfeasance.

Importantly, the Medical Board did not allege Dr. Tatreau had committed negligence or malfeasance in California, Colorado or Minnesota. Rather, the Medical Board insisted he was subject to discipline in Minnesota simply because he had been disciplined in the other jurisdictions.[1] The Medical Board refused to consider any evidence in support of Dr. Tatreau's contention that the underlying allegations against him in California and Colorado were without merit.

By Notice of Conference, the CRC informed Dr. Tatreau he would have a pre-hearing conference on February 9, 1996 to "simplify and narrow the issues for potential hearing." The notice also promised Dr. Tatreau he would have a contested case hearing, at a date and time to be determined at the pre-hearing conference, at which he would be "given an opportunity to be heard orally, to present witnesses and to submit evidence and argument."

At the pre-hearing conference the CRC moved for summary disposition of the Medical Board's authority to discipline Dr. Tatreau on the basis of the surrender of his licenses in California and Colorado. Dr. Tatreau contested the CRC's Motion for Summary Disposition on the grounds that, consistent with due process, he could not be disciplined without a contested case hearing as to the merits of the

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[1] At the Medical Board proceedings and on appeal, Dr. Tatreau contested whether the voluntarily surrender his medical licenses in California and Colorado constituted discipline. For the purpose of this Petition, however, Dr. Tatreau does not contest that voluntary surrender constituted discipline in the other jurisdictions.

underlying extra-jurisdictional allegations. Dr. Tatreau also insisted that the CRC's motion should be denied because he had a federal due process right to present mitigating evidence and testimony.

Dr. Tatreau presented evidence, in the form of an affidavit, in opposition to the CRC's motion for summary judgment. However, the Medical Board denied Dr. Tatreau an opportunity to call witnesses or present documentary evidence to demonstrate there was such an infirmity of proof as to the facts alleged in California and Colorado that the Medical Board could not properly rely upon the surrender of his licenses in those jurisdictions as evidence of his fitness to practice medicine in the state of Minnesota. Further, Dr. Tatreau did not have an opportunity to present evidence that the high quality of medical care he rendered in California, Colorado and Minnesota mitigated against any public interest in disciplining him.

At the pre-hearing conference, the Administrative Law Judge recommended that the CRC's motion be granted, without holding a contested case hearing at which Dr. Tatreau could present evidence and testimony. Acting on the Administrative Law Judge's recommendation, the Minnesota Board of Medical Practice granted the CRC's motion for summary disposition, solely on the basis on the surrender of his licenses in California and Colorado. The Medical Board did not conduct any independent inquiry into the factual basis for the allegations against Dr. Tatreau in California or Colorado and refused to permit Dr. Tatreau the opportunity to present mitigating evidence or testimony in support of his qualifications and the high standard of care he provided to patients in California, Colorado and Minnesota.

The Minnesota Board of Medical Practice entered a final order reprimanding Dr. Tatreau, imposing restrictions on his

practice of medicine and fining him $400 to cover investigative costs. Dr. Tatreau petitioned the Minnesota Court of Appeals for certiorari, arguing that the Medical Board denied him due process by refusing to hold a contested case hearing at which he could present evidence and testimony concerning the merits of the underlying accusations and mitigating evidence as to the high quality of his medical practice. The Court of Appeals affirmed the Medical Board's ruling, holding that a physician's property interest in his medical license is entitled only to a "minimum" level of due process.

Dr. Tatreau petitioned the Minnesota Supreme Court for review. The Minnesota Supreme Court denied review of Dr. Tatreau's case on December 17, 1996. This Petition followed.

REASONS FOR GRANTING THE WRIT

This Court has held repeatedly that medical and legal personnel have a federal due process property interest in their professional licenses. Friedman v. Rogers, 440 U.S. 1, 99 S.Ct. 887 (1979); Gibson v. Berryhill, 411 U.S. 564, 93 S.Ct. 1689 (1973); In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222 (1968). Lower courts, however, have experienced great difficulty in determining the precise level of process due in professional license discipline cases. In particular, state courts of review and federal circuit courts of appeal have expressed sharp disagreement about the level of process due in professional disciplinary proceedings based upon disciplinary action taken in other jurisdictions. See, e.g., Matter of Tatreau, No. C4-96-1067 (Minn. App. Oct. 22, 1996), review denied (Minn. Dec. 17, 1996); In Re Thies, 662 F. 2d 771 (D.C. Cir. 1980); Marek v. Board of Podiatric Medicine, 20 Cal. Rptr. 2d 474 (Cal. Dist. Ct. App. 1993), review denied, (Sept. 16, 1993); Butts v. Wyoming State Bd. of Architects,

911 P.2d 1062 (Wyo. 1996); Halyalkar v. Board of Regents, 527 N.E.2d 1222 (N.Y. App. 1988).

The forgoing decisions are in hopeless conflict with respect to whether a state licensing body can discipline a professional based exclusively on the fact of discipline in another jurisdiction, without conducting an independent factual inquiry to determine whether the discipline imposed in the foreign jurisdiction had a basis in fact. See Thies, 662 F. 2d at 773; Halyalkar, 527 N.E.2d 2d at 1226; Marek, 20 Cal. Rptr. at 477-80. In Thies, the Sixth Circuit held a federal court cannot, consistent with due process, discipline an attorney based on state court disbarment proceedings without conducting some independent review of the facts giving rise to the attorney's disbarment. 662 F.2d at 773. In Halyalkar, the court reached a similar conclusion, holding a Medical Board cannot discipline a physician based on the voluntary surrender of the physician's license in another jurisdiction without conducting a hearing on the merits of the allegations in the foreign jurisdiction. 527 N.E.2d at 1226. Conversely, in Marek and Butts, the courts found that professional license holders were subject to discipline in one jurisdiction based solely on their license- revocation in another. 20 Cal. Rptr. at 477-80; 911 P.2d 1065. This Court should accept certiorari to resolve the inconsistency in the lower courts' decisions on the issue presented.

Lower courts also have differed in their opinions as to whether a medical professional is entitled to submit mitigating evidence and testimony to a professional licensing board during disciplinary proceedings. In this case, the Minnesota courts of review found that the "minimum" level of due process afforded by the Minnesota Medical Board was sufficient. The Minnesota Supreme Court and Minnesota Court of Appeals reached this conclusion notwithstanding the

fact Dr. Tatreau was denied a contested case hearing at which he could present evidence or testimony concerning the high quality of care he provided to patients in Minnesota, along with other mitigating factors.

Every other state court to consider the issue, however, noted professional license-holders are entitled, at a minimum, to a hearing at which they can present mitigating evidence prior to the imposition of discipline. Marek, 20 Cal. Rptr. at 481 (practitioners "presented numerous witnesses who testified as to their professional ability, their reputations for truth and veracity, and the quality of their patient record keeping"); Butts, 911 P.2d at 1066 ("Butts was allowed to present mitigating testimony to the Board in the hearing").

A Supreme Court decision in this matter also is necessary to clarify an important question of law which has not been, but should be, settled by this Court. This Court has held that professional license-holders are entitled to due process protection. Friedman v. Rogers, 440 U.S. at 18, 99 S.Ct. at 898; In re Ruffalo, 390 U.S. at 551, 88 S.Ct. 1226. The lower courts, however, are in need of guidance as to the requisite level of process in disciplinary proceedings. Particularly, this Court should clarify whether professional license-holders are entitled to review of underlying facts before reactionary discipline is imposed based on action in other jurisdictions. This issue appears to be recurring in the lower courts, and producing disparate results.

Finally, this Court should accept certiorari because the decisions of the Minnesota appellate courts affirming the Medical Board's final order are in conflict with controlling precedent issued by this Court. In Selling v. Radford, 243 U.S. 46, 37 S.Ct. 377 (1917), this Court addressed the analogous issue of the level of inquiry a federal court must conduct before disbarring an attorney based upon disbarment

in a state court of last resort. The Court concluded, in conflict with the recent opinions of the Minnesota appellate courts, that due process requires more than simply reacting to a state court finding of unfitness. Id. at 50, 37 S.Ct. at 378.

In Selling, the Court explained that a federal court may give conclusive effect to a state court finding that an attorney is unfit to practice law only if, upon an independent review of the record, none of the following conditions should appear:

> 1, That the state procedure from want of notice or opportunity to be heard was wanting in due process; 2, that there was such an infirmity of proof as to facts found . . . that we could not . . . accept as final the conclusion [of the state]; 3, that some other grave doubt existed [as to the adequacy of the state's procedures or factual findings].

Id. at 50, 37 S.Ct. at 378. In Ruffalo, the Supreme Court reaffirmed the standard enunciated in Selling. 390 U.S. at 551, 88 S.Ct. 1226.

The standard established in Selling should apply with equal force to medical board discipline based exclusively on the fact of discipline in another jurisdiction. Nonetheless, the Minnesota courts of review, and state court decisions in Marek and Butts, ignored this Court's controlling precedent.

In addition to disregarding controlling precedent with respect to a professional's due process right to have at least some level of independent review of extra-jurisdictional discipline, the Minnesota courts' decisions in Dr. Tatreau's case also are in conflict with Supreme Court precedent concerning the right to present mitigating evidence and testimony. This Court long has recognized the right to allocution is fundamental. Groppi v. Leslie, 404 U.S. 496, 92

S.Ct. 582 (1972); Green v. United States, 365 U.S. 301, 81 S.Ct. 653 (1961). In Groppi, the Court emphasized that the right of allocution stemmed from the Fifth Amendment right to due process of law. 404 U.S. 501-02, 92 S.Ct. at 586.

The Minnesota courts' decisions in Dr. Tatreau's case deviate from the well-reasoned opinions of other state and federal courts and indicate a need for clarification of this important area of the law. The Minnesota Supreme Court's order denying review of the Court of Appeals' decision also flies in the face of this Court's controlling precedent.

For the reasons set forth above, Petitioner respectfully requests that this Court issue a Writ of Certiorari to the Minnesota Supreme Court in this case.

Respectfully submitted,

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STATE OF MINNESOTA

IN SUPREME COURT

C4-96-1067

In the Matter of the Medical License of
Robert W. Tatreau, M.D.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Robert W. Tatreau, M.D. for further review be, and the same is, denied.

Dated: December 17, 1996

BY THE COURT:

s/A.M. Keith

Chief Justice

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A. 08, subd. 3 (1994).

STATE OF MINNESOTA
IN COURT OF APPEALS
C4-96-1067

In the Matter of the Medical License of
Robert W. Tatreau, M.D.

Filed October 22, 1996
Affirmed
Lansing, Judge

Minnesota Board of Medical Practice
[OAH Fide No. 12-0903-10311-2]
[License No. 21,662]

Andrew S. Birrell, Ian A.J. Pitz, Meshbesher Birrell & Dunlap, Ltd., 2450 Park Avenue, Minneapolis, MN 55404 (for Relator, Robert W. Tatreau)

Hubert H. Humphrey III, Attorney General, David E. Flowers, Mary L. Stanislav, Assistant Attorneys General, 525 Park Street, Suite 500, St. Paul, MN 55103 (for Respondent, Minnesota Board of Medical Practice)

Considered and decided by Willis, Presiding Judge, Lansing, Judge, and Kalitowski, Judge.

UNPUBLISHED OPINION

LANSING, Judge

We review by certiorari an order of the Minnesota Board of Medical Practice disciplining a physician on the ground that he previously had disciplinary action taken against his medical licenses in two other states. We conclude that the terms of the physician's stipulated surrender of his licenses in those states provided adequate grounds for the board to impose discipline against the physician's Minnesota medical license, that the board's summary disposition of the disciplinary proceedings did not violate due process, and that the board did not unreasonably delay the commencement of the proceedings. We affirm.

FACTS

Robert Tatreau has been licensed to practice medicine and surgery in Minnesota since September 1974. He received licenses to practice in California, in 1978, and in Colorado, in 1985.

Tatreau practiced as an obstetrician and gynecologist in California until May 1984, when a hospital there suspended his staff privileges. He later lost his staff privileges at a second hospital in California. Tatreau then moved to Colorado, where he began practicing as an obstetrician and gynecologist in February 1985.

The California Board of Medical Quality Assurance filed an accusation against Tatreau in June 1986. In that accusation and in supplemental allegations, the board charged Tatreau with engaging in unprofessional conduct in connection with his allegedly incompetent, negligent, and grossly negligent treatment of seven patients between June 1981 and May 1984. In a settlement that became effective on March 24, 1989, Tatreau stipulated to the surrender of his certificate to practice in California and "to any rights he may have to renew or reinstate that certificate, except by order of the Board."

The Colorado Board of Medical Examiners also began an investigation into Tatreau's medical practice and discovered that, when Tatreau applied for a medical license in Colorado, he had failed to inform that state of one of the two California hospitals that had suspended his staff privileges. The Colorado Board found that this omission constituted "fraud, misrepresentation, or deception in applying for his Colorado medical license." Tatreau waived his right to a hearing on this charge and entered into a stipulation under which he agreed to surrender his license to practice medicine in Colorado.

Tatreau returned to Minnesota in September 1988. In November 1989 the Complaint Review Committee of the Minnesota Board of Medical Examiners informed him that it had become aware of the proceedings against him in California and Colorado. The committee continued to investigate and beginning in March 1994 attempted to reach a stipulation with Tatreau.

The committee formally initiated a contested case on January 12, 1996, alleging that Tatreau could be subject to discipline in Minnesota on the basis of previously having had disciplinary action taken against his medical licenses in California and Colorado. The committee moved for a summary disposition of the case. Following a prehearing conference, the ALJ recommended that the board grant the committee's motion. The board, after hearing oral arguments from the parties, adopted the ALJ's recommendation, reprimanded Tatreau, charged him With $455 in costs for the proceedings, and conditioned his future practice in obstetrics and gynecology on obtaining "pre-approval [from the Complaint Review Committee] of his practice setting," and obtaining a committee determination of fitness "[p]rior to commencing practice."

ANALYSIS

Tatreau raises three arguments on this review of the board's order. He contends that (1) the board erred in concluding that the stipulations under which he agreed to surrender his medical licenses in California and Colorado constituted grounds for disciplining him in Minnesota, (2) the limited nature of the ALJ's and board's proceedings violated due process, and (3) the board unreasonably delayed commencing the disciplinary proceedings against him.

I

Tatreau first argues that the board erroneously concluded that his agreement to surrender his medical licenses pursuant to stipulations in California and Colorado provided grounds to discipline him in Minnesota under Minn. Stat. § 147.091, subd. 1(d) (Supp. 1995). This issue of statutory construction presents a question of law, which we review de novo. ***Doe v. State Bd. of Medical Examiners***, 435 N.W.2d 45, 48 (Minn. 1989).

Section 147.091, subdivision 1(d), provides that the following may be grounds for the discipline of a physician who is licensed to practice in Minnesota:

> Revocation, suspension, restriction, limitation, or other disciplinary action against the person's medical license in another state or jurisdiction, failure to report to the board that charges regarding the person's license have been brought in another state or jurisdiction, or having been refused a license by any other state or jurisdiction.

Minn. Stat. § 147.09 1, subd. 1(d). The forms of disciplinary action that the board may take against a physician who is

licensed in this state include: the revocation or suspension of a license, limitations or conditions on the physician's practice, civil penalties, unremunerated professional service requirements, and censure or reprimand. Minn. Stat. § 147.141 (1994).

Tatreau asserts that the stipulations that he entered into in Colorado and California amounted to no more than the voluntary surrender of his medical licenses in those states. Because the phrase "voluntary surrender" does not appear on the list of permissible forms of disciplinary action that the board may take under section 147.141, Tatreau contends that the board improperly concluded that there were adequate grounds to discipline him under section 147.091, subdivision 1(d). We disagree.

Under the terms of the California stipulation, Tatreau not only surrendered his certificate to practice, but he also surrendered "any rights he may have [had] to renew or reinstate that certificate, except by order of the [California] Board." The stipulation further provided that the California Board would deem as admitted one set of allegations against Tatreau if he ever applied for renewal or reinstatement of his certificate in California. These terms imposed "restrictions, limitations, or other disciplinary action" against Tatreau and thus provided a proper ground for disciplining him under Minn. Stat. § 147.091, subd. 1(d).

We also conclude that Tatreau's stipulation in Colorado constituted a second basis for discipline under Minn. Stat. § 147.091, subd. 1(d). In Colorado, as in California, Tatreau agreed to surrender his medical license. In addition Tatreau acknowledged in the Colorado stipulation that the surrender of his license in that state would "have the same force and effect as if the [Colorado] Board had entered an order of revocation upon the conclusion of formal administrative hearings." His stipulation was thus effectively a "[r]evocation* * *in another state" under section 147.091, subdivision 1(d).

II

It is undisputed that the Minnesota Board's disciplinary action against Tatreau deprived him of a property interest in his medical license. ***See Humenansky v. Minnesota Bd. of Medical Examiners***, 525 N.W.2d 559, 566 (Minn. App. 1994), ***review denied*** (Minn. Feb. 14, 1995). Tatreau claims that the board's proceedings depriving him of that interest violated due process.

Due process requires notice and an opportunity to be heard. ***Goldberg v. Kelly***, 397 U.S. 254, 90 S. Ct. 1011 (1970). Tatreau does not argue that he received inadequate notice, but claims that he was not given an adequate opportunity to be heard. Specifically, he asserts that the ALJ or the board should have conducted a hearing at which he could have presented evidence of (1) the underlying charges against him and (2) factors that might mitigate the board's decision to discipline him.

The Minnesota Board was not required to provide Tatreau with a hearing on the underlying allegations made against him in California and Colorado, because he expressly waived his right to a hearing on those allegations. ***See Marek v. Board of Podiatric Medicine***, 20 Cal. Rptr.2d 474 (Ct. App. 1993) (finding no due process violation when California Board disciplined podiatrists on ground that Nevada consent decrees constituted discipline in another state), ***review denied*** (Cal. Sept. 16, 1993).

Neither did the lack of a full evidentiary hearing on the subject of mitigating factors violate due process. Tatreau was given the opportunity to submit a memorandum and a supporting affidavit in opposition to the Complaint Review Committee's motion for summary disposition, to participate in a prehearing conference with the ALJ, and to argue orally before the board. These proceedings satisfied minimum due

process requirements under the circumstances. ***See Humenansky***, 525 N.W.2d at 566 ("Due process is a flexible concept and the form of procedural protection varies according to the particular situation.").

III

Finally, Tatreau argues that the board unreasonably delayed in commencing the disciplinary proceedings against him.

To the extent that this argument is premised on the doctrine of laches, it cannot be invoked as a defense against the board, which is a governmental body and was acting in its sovereign capacity by bringing this action against Tatreau in an effort to protect the public interest. ***Leisure Hills v. Department of Human Servs.***, 480 N.W.2d 149, 151 (Minn. App. 1992).

Alternatively, Tatreau argues that, even if the doctrine of laches does not apply to the board, basic principles of due process should preclude even a governmental entity from benefitting from an unreasonable delay. Although some courts have expressed approval of such a rule, they require parties asserting the defense to demonstrate prejudice from the delay in order for the defense to apply. ***See, e.g., Gropp v. District of Columbia Bd. of Dentistry***, 606 A.2d 1010, 1016 (D.C. 1992); ***cf. Wheeler v. City of Wayzata***, 533 N.W.2d 405, 409 (Minn. 1995) (stating in the context of a laches defense that prejudice is not always essential, but it is significant in determining whether the delay was reasonable). The facts of this case demonstrate that any delay in formally commencing the proceedings against Tatreau was not unreasonable; at least part of the delay resulted from the board's efforts to resolve the matter by negotiating a stipulation with Tatreau. Tatreau has also failed to establish that he was prejudiced by the delay. Although Tatreau claims that he would have difficulty

obtaining reliable testimony from witnesses to the underlying charges against him in California, the board's decision did not require the consideration of such evidence. The board's determination that Tatreau had been subjected to disciplinary action in other states depended only on the undisputed existence of official documents: the California and Colorado stipulations.

DECISION

Tatreau's stipulations to surrender his medical licenses in California and Colorado provided sufficient grounds for discipline under Minn. Stat. § 147.091, subd. 1(d). The proceedings of the Minnesota Board of Medical Practice comported with due process, and the delay in the commencement of the proceedings was not unreasonable nor did it result in prejudice.

Affirmed.

s/Harriet Lansing
October 15, 1996.

BEFORE THE MINNESOTA
BOARD OF MEDICAL PRACTICE

In the Matter of the
Medical License of
Robert W. Tatreau, M.D.
Date of Birth: 9-20-42
License Number: 21,662

FINDINGS OF FACT, CONCLUSIONS, AND FINAL ORDER

The above-entitled matter was heard by Administrative Law Judge Steve M. Mihalchick on February 9, 1996, on a Motion for Summary Disposition made by the Complaint Review Committee ("Committee") of the Minnesota Board of Medical Practice ("Board").

Jacquelyn E. Albright, Assistant Attorney General, 525 Park Street, St. Paul, Minnesota 55103, represented the Committee. Andrew S. Birrell and Ian A.J. Pitz, Meshbesher, Birrell & Dunlap, Ltd., 2450 Park Avenue, Minneapolis, Minnesota 55404, appeared on behalf of Respondent, Robert W. Tatreau, M.D.

The Board met to consider this matter on May 11, 1996, at the Colonial Office Building, 2700 University Avenue West, St. Paul, Minnesota. The matter was orally argued by David Flowers, Assistant Attorney General, 525 Park Street, St. Paul, Minnesota 55103, on behalf of the Committee and Ian Pitz, on behalf of Respondent.

Based upon its review of the record of this proceeding, the Board makes the following:

FINDINGS OF FACT

1. On September 20, 1974, Respondent was issued a license to practice medicine and surgery in the State of Minnesota.

2. On September 19, 1978, Respondent was issued a certificate to practice medicine and surgery in the State of California.

3. On June 24, 1986, the Board of Medical Quality Assurance of the State of California made and filed an Accusation against Respondent alleging that Respondent committed acts of negligence and incompetence in discharging his duties as a physician. A First Supplemental Accusation was filed by the California Board on January 9, 1987, which alleged that Respondent had engaged in acts of gross negligence and incompetence in discharging his duties as a physician. A Second Supplemental Accusation was filed by the California Board on April 26, 1988, which alleged that Respondent had committed acts of unprofessional conduct, gross negligence, repeated similar negligent acts, incompetence and corruption in discharging his duties as a physician and surgeon. The foregoing allegations arose from Respondent's obstetrics and gynecology practice in California. The charges involved seven patients.

4. On March 24, 1989, Respondent and the California Board entered into a Settlement in Stipulation in which the California Board ordered the surrender of Respondent's Physician and surgeon's certificate and terminated Respondent's right to renewal or reinstatement of said certificate except by order of the Board.

5. On January 10, 1985, Respondent was issued a license to practice medicine in the State of Colorado.

6. Effective January 18, 1989, the Colorado State Board of Medical Examiners and Respondent entered into a Stipulation and Order in which the Colorado Board ordered Respondent, to surrender his license to practice medicine in the State of Colorado. In the Stipulation, Respondent agreed that he had resorted to fraud, misrepresentation or deception in applying for his Colorado medical license, and that the surrender of his license would have the same force and effect

as if the Board had entered an order revoking Respondent's license to practice medicine in the State of Colorado.

Based upon the forgoing Findings of Fact, the Board makes the following:

CONCLUSIONS

1. The Minnesota Board of Medical Practice and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.57 to 14.69, and 147.01 to 147.36, 214.10 and 214.103 (1994), and Rules for Contested Cases of the Office of Administrative Hearings, Minn. R. 1400.5100 to 1400.8401 (1995).

2. The Board and the Complaint Review Committee gave proper notice in this matter and have fulfilled all relevant substantive and procedural requirements of law and rules.

3. Respondent's surrender of his medical license pursuant to Consent Orders in the States of California and Colorado constitutes disciplinary action against Respondent by other states, in violation of Minn. Stat. § 147.091, subd. 1(d).

4. Pursuant to Minn. Stat. § 147.091, subd. 1(d), disciplinary action taken against a person's medical license in another state or jurisdiction is grounds for the Board to refuse to grant a license or for the imposition of disciplinary action as described in section 147.141 against any physician.

Based on the forgoing Findings of Fact and Conclusions, the Board issues the following:

ORDER

1. The attached Recommendation on Motion for Summary Disposition of Administrative Law Judge Steve M. Mihalchick, dated March 6, 1996, is adopted in its entirety.

2. Respondent is hereby REPRIMANDED based on the above-referenced conduct.

3. If Respondent intends to practice in the area of obstetrics and gynecology in Minnesota, with the exception of

emergency evaluation, Respondent shall comply with the following conditions:

a. Respondent shall obtain pre-approval of his practice setting. To obtain approval, Respondent shall make a written request to the Complaint Review Committee, describing the proposed practice setting. Any approval by or on behalf of the Complaint Review Committee must be communicated to Respondent in writing. Respondent shall not commence any obstetrical and gynecological practice in Minnesota without obtaining preapproval from the Complaint Review Committee.

b. Prior to commencing practice in the area of obstetrics and gynecology, Respondent shall meet will the Complaint Review Committee which shall determine his fitness to practice in this area.

4. Within ten days of the date of this order, Respondent shall supply written verification to the Board that his current employer has been provided a copy of this order. In the event Respondent's practice setting changes, Respondent shall supply written verification to the Board, within ten days of obtaining new employment, that Respondent's new employer has been provided a copy of this order.

5. Within thirty days of the date of this order, Respondent shall pay to the Board a civil penalty of $455.00. This is the amount of the investigative costs of the proceeding according to Affidavit of Jacquelyn E. Albright, Assistant Attorney General. The amount of the investigative costs is undisputed.

Dated: 20 May, 1996.

MINNESOTA BOARD OF
MEDICAL PRACTICE

s/M. J. Martin, M.D.

CONTAINS NOT PUBLIC DATA 12-0903-10311-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA BOARD OF MEDICAL PRACTICE

In the Matter of the Medical License of Robert W. Tatreau, M.D. License No. 21,662	**RECOMMENDATION ON MOTION FOR SUMMARY DISPOSITION**

The above-entitled matter came on for argument before Administrative Law Judge Steve M. Mihalchick on February 9, 1996, on a Motion for Summary Disposition made by the Minnesota Board of Medical Practice (Board), through its Complaint Review Committee (Committee).

The Committee was represented by Jacquelyn E. Albright, Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, Minnesota 55103-2106. The Respondent was represented by Andrew S. Birrell and Ian A.J. Pitz, Meshbesher, Birrell & Dunlap, Ltd., 2450 Park Avenue, Minneapolis, Minnesota 55404.

Based upon the Memoranda filed by the parties, the oral argument, all of the filings in this case, and for the reasons set out in the Memorandum which follows, the Administrative Law Judge makes the following

RECOMMENDATION

IT IS HEREBY RESPECTFULLY RECOMMENDED that the Board of Medical Practice grant the Committee's motion for summary disposition.

Dated this ___ day of March, 1996.

s/s
Steve M. Mihalchick
Administrative Law Judge

MEMORANDUM

Background Facts

Based upon the pleading, memoranda, and affidavits submitted in this matter, the underlying facts in this case are as follows. The Respondent was initially licensed by the Minnesota Board of Medical Practice on September 20, 1974. On September 19, 1978, Respondent was issued a physician and surgeon's certificate in California. On January 10, 1985, Respondent was licensed to practice medicine in the State of Colorado. In February of 1985, the Respondent began practicing in Colorado.

On June 24, 1986, the Board of Medical Quality Assurance of California filed an accusation against Respondent. Respondent was charged with unprofessional conduct by committing acts of gross negligence and incompetence in discharging his duties as a physician subjecting Respondent to disciplinary action.

On January 9, 1987, the Board of Medical Quality Assurance of California filed a first supplemental accusation. A second supplemental accusation was filed against Respondent by the California Board on April 26, 1988. These accusations alleged that Respondent had committed acts of gross negligence and incompetence in the discharge of his duties as a physician.

Effective January 18, 1989, the Colorado State Board of Medical Examiners and the Respondent entered into a Stipulation and Order. Pursuant to paragraph 9 and 10 of the stipulation, Respondent admitted and the Board found that Respondent resorted to fraud, misrepresentation, or deception in applying for his Colorado medical license and thereby violated Colorado law. Paragraph 11 stated that the Stipulation and Order were entered into by Respondent voluntarily and without coercion and after being fully advised

as to his rights to a hearing and the consequences of the Stipulation and Order and that the Stipulation and Order shall possess the same force and effect as an order entered as a result of a formal disciplinary hearing. Pursuant to paragraph 13 of the stipulation, Respondent acknowledged and agreed that the surrender of his medical license shall have the same force and effect as if the Board had entered an order of revocation upon the conclusion of formal administrative hearing.

Effective March 24, 1989, the Board of Medical Quality Assurance of California and Respondent entered into a Stipulation in Settlement. Paragraph 4 of the stipulation stated that, Respondent stipulated to the surrender of his physician's and surgeon's certificate and to any right to renewal or reinstatement of the certificate, except by order of the Board. In addition, the stipulation stated that in the event that Respondent applies for renewal or reinstatement of his certificate, the Board may file a statement of issues or accusations challenging the reinstatement, renewal or issuance of a license to Respondent. In the event of the filing of a statement of issues or accusations against Respondent, specific facts of the second supplemental accusation will be deemed admitted by Respondent at that time. In signing this stipulation, Respondent stated that he willingly and voluntarily agreed to waive certain rights, including but not limited to a hearing on the charges and to appeal any adverse decision. Paragraph 3 of the stipulation stated that Respondent was represented by counsel and has consulted with counsel concerning the allegations and charges in the case and the effect of the stipulation.

In September of 1988, the Respondent moved to the State of Minnesota and has practiced medicine in Minnesota since 1989. On November 9, 1989, the Committee issued a Notice of Conference. The Notice states that the question to be considered is whether the Committee should conclude, based

upon the above-referenced actions, that Respondent had disciplinary action taken against his medical license in another jurisdiction in violation of § 147.091, subd. 1(d).

On January 31, 1990, the Committee held a conference with Respondent to discuss the nature of the underlying allegations and the merits of the California complaint against him. Respondent provided all pertinent records to the Committee in April of 1990. On March 31, 1994, the Committee submitted to Respondent's counsel a Stipulation and Order to resolve the all outstanding complaints filed against Respondent. The stipulation was not executed.

Legal Analysis

Summary disposition is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Minn. R. part 1400.5500 K; Minn.R.Civ.P. 56.03. Theile v. Stitch, 425 N.W.2d 580, 583 (Minn. 1988); Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. Ct. App. 1989). Summary disposition is the administrative equivalent to summary judgment and the same standards apply. Minn. R. 1400.6600. A genuine issue is one which is not a sham or frivolous and a material fact is a fact whose resolution will affect the result or outcome of the case. Highland Chateau, Inc. v. Minnesota Department of Public Welfare, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984) rev. denied (Minn. Feb. 6, 1985)

The initial burden is on the moving party to show facts that establish a prima facie case and assert that no genuine issues of fact remain for hearing. Theile, 425 N.W.2d, 580, 583 (Minn. 1988). The non-moving party must then show that there are specific facts in dispute which have a bearing on the outcome of the case. Highland Chateau, 356 N.W.2d at 808. General averments are not enough to meet the nonmoving party's burden. Carlisle, 437 N.W.2d, 712, 715

(Minn. Ct. App. 1988). When considering a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party. Ostendorf v. Kenyon, 347 N.W.2d 834 (Minn. Ct. App. 1984).

The Committee's argument for summary disposition alleges that the facts set forth above, regarding the consent orders of California and Colorado, violate Minn. Stat. § 147.091, subd. 1(d). Minn. Stat. § 147.091, subd.1(d), provides as follows:

> The board may refuse to grant a license or may impose disciplinary action as described in section 147.141 against any physician. The following conduct is prohibited and is grounds for disciplinary action:
>
> (d) Revocation, suspension, restriction, limitation, or other disciplinary action against the person's medical license in another state or jurisdiction, failure to report to the board that charges regarding the person's license have been brought in another state or jurisdiction, or having been refused a license by any other state or jurisdiction.

In its motion, the Committee asserts that "other disciplinary action" has been taken against the Respondent's medical license in other states, namely California and Colorado, in violation of the above statute. In addition, the Committee contends that such discipline by other states warrants the imposition of discipline by the Minnesota Board of Medical Practice without proof of the underlying allegations from those states.

The Committee contends that disciplinary action has been taken against the Respondent's medical licenses in California and Colorado pursuant to stipulations that Respondent entered

into with the Medical Boards of these states. The Committee asserts that the context in which the consent orders arose and the wording of the stipulations leads to the conclusion that the stipulations are disciplinary actions. The Committee also points out that both stipulations were reported to the Federation of State Medical Boards, which also supports the conclusion that the stipulations were considered disciplinary actions by both California and Colorado. The Committee contends that the states wanted to make a disciplinary record that would follow Respondent as he moved from one state to the next.

The Committee points out that both the stipulations arose out of alleged disciplinary violations. The California allegations of unprofessional conduct are documented in the Accusation and First and Second Supplemental Accusations filed by the Executive Director of the California board. In Colorado, allegations of fraud, misrepresentation, or deception are set forth in the Colorado stipulation.

The Committee argues that in the California stipulation, the Respondent was required to surrender his license and agree to surrender any rights he may have to renew or reinstate his certificate, except by order of the board. In the event that he applied for renewal or reinstatement of his certificate or for a new certificate, certain facts of the Second Supplemental Accusation would be deemed admitted. The stipulation also stated that Respondent waived his rights to a hearing on the charges and his right to appeal any adverse decision.

The Committee, likewise, asserts that the wording of the Colorado stipulation makes it clear that it was disciplinary in nature. The Committee points out that the caption itself identifies the matter as a "Disciplinary Action." The Committee also contends that the stipulation contains such language as: "surrender of his medical license shall have the same force and effect as if the Board had entered an order of

revocation upon the conclusion of formal administrative hearings,"... "The order of the Board resulting from this Stipulation and Order shall possess the same force and effect as an order entered as a result of a formal disciplinary hearing..."

The Respondent argues that he did not violate Minn. Stat. § 147.09 1, subd. 1(d) in that he voluntarily agreed to surrender his license in exchange for the dismissal of all charges against him in California and Colorado. That act of voluntarily surrendering his license, he asserts, does not fall under Minn. Stat. § 147.091, subd. 1(d) as constituting "revocation, suspension, restriction, limitation or other disciplinary action against the person's medical license in another state." Respondent argues that Minn. Stat. § 147.141 does not include voluntary surrender as a form of disciplinary action and that none of the types of disciplinary actions listed in § 147.141 were taken against Respondent in the other states.

Respondent also argues that "a foreign jurisdiction and a physician should be entitled to negotiate a mutually acceptable disposition of dubious allegations of professional misconduct by simply permitting the voluntary surrender of the physician's license, without subjecting him to reactionary, reciprocal disciplinary action in other jurisdictions." Citing Halyalkar v. Board of Regents, 527 N.E.2d 1222, 1225 (N.Y. App.1988). Respondent maintains that if he had been aware that the negotiated disposition of the Colorado and California proceedings would affect his ability to practice medicine in Minnesota, he never would have agreed to surrender his license and would have subjected both himself and those states to the expensive and time consuming contested case hearing process.

Furthermore, Respondent asserts that is would be unfair to suggest that, in order to avoid disciplinary action in Minnesota, Respondent would be required to travel back to

California and Colorado and incur the expense and inconvenience of a full contested case hearing on the allegations against him in both of those jurisdictions. The Respondent had already abandoned his practices in California and Colorado and determined that his license in those jurisdictions was no longer of importance to him. Respondent argues that those states voluntarily elected to forego disciplinary proceedings, and dismiss all charges against Respondent, in exchange for the voluntary surrender of his license.

The Administrative Law Judge finds that Respondent's January 1989 Stipulation and Order in Colorado and the March 1989 Stipulation in Settlement in California constitute disciplinary action against Respondent by other states. Minn. Stat. § 147-091, subd. 1(d), allows for the imposition of disciplinary action by the Minnesota Medical Practices Board based on "disciplinary action" taken against a person's medical license in another state or jurisdiction. The phrase "other disciplinary action...in another state," is a phrase that takes into consideration all other types of disciplinary actions by other states, even if they are not specifically termed revocation, suspension, restriction, or limitation. "Other disciplinary action" is a catch-all phrase whose purpose is to try and encompass all types of disciplinary actions of other states.

Therefore, for subdivision 1(d) to be limited to just the four methods of discipline termed revocation, suspension, restriction, or limitation, would render the statute ineffective in accomplishing the purposed for which it was enacted and would limit discipline to those states that only used those specific terms. Stipulations arising out of allegations of misconduct that include the action of the surrender of a person's medical license may be deemed to be considered disciplinary action.

Consent decrees have been found to constitute discipline by other states under statutes similar to Minnesota's. Marek v. Board of Podiatric Medicine, 20 Cal. Rptr. 2d 474 (Cal. Dist. Ct. App. 1993), rev. denied (Sept. 16, 1993). The California statute in the Marek case is similar to Minnesota's in providing that, "the revocation, suspension or other discipline by another state of a medical license or certificate issued by that state 'shall constitute grounds for disciplinary action for unprofessional conduct against such license in this state.'" The Court in Marek found that discipline in any other state included discipline pursuant to a consent decree where there was no admission of the charges brought by the foreign jurisdiction.

Respondent's argument that Minn. Stat. § 147.141 does not list surrender as a form of discipline to be imposed is inapplicable because that statute describes the form of disciplinary action that the Minnesota Medical Practice Board may take for a violation of the chapter 147. The statute does not define the disciplinary action of other states as it is used in Minn. Stat. § 147.091, subd. 1(d).

Both the California and Colorado stipulations were based upon disciplinary investigations of the misconduct of Respondent. The fact that the surrender of Respondent's license was a condition of the stipulation does not mean that the action was not disciplinary. The Colorado stipulation states that Respondent admits and the Board found that Respondent resorted to fraud, misrepresentation, or deception in applying for his Colorado medical license. Pursuant to the stipulation, Respondent acknowledged and agreed that the surrender of this medical license shall have the same force and effect as if the Board had entered an order of revocation upon the conclusion of formal administrative hearings pursuant to Colorado law.

Under the California stimulation, Respondent was not allowed just to surrender his physician's and surgeon's

certificate, but he also stipulated to any right to renewal or reinstatement of his certificate, except by order of the Board. The stipulation stated that in the event that Respondent applies for renewal or reinstatement of his certificate, the Board may file a statement of issues or accusations challenging the reinstatement, renewal or issuance of a license to Respondent. In the event of the filing of a statement of issues or accusations against Respondent, specific facts of the second supplemental accusation will be deemed admitted by Respondent at that time. The difficulty in regaining licensure in California is another factor that weighs in the determination that the stipulation constituted a disciplinary action. See In Re Sympson, 322 S.W. 2d, 808 (Mo. 1959).

If the surrender of Respondent's license were truly a voluntary action that Respondent did because he was returning home to Minnesota, then there would not have been a need for a stipulation and order regarding the surrender of the licensure or conditions and the allegations that would be deemed admitted upon renewal or reinstatement in California. In addition, Respondent was represented by counsel in the California proceeding. Counsel at that time consulted with the Respondent concerning the allegations and charges in the case and the effect of the stipulation.

The context in which the stipulations arose, the wording of both the Colorado and the California stipulations, the fact that the actions were reported to the Federation of Medical Boards by both states and the fact that Respondent was represented by counsel in the California proceeding support the conclusion that the stipulations were disciplinary actions and that the surrender of the license was a part of such discipline actions. The fact that Respondent surrendered his license while pursuant to a negotiated settlement does not mean that the underlying allegations are without merit and that he should escape all consequences of his disciplinary action.

The Committee also asserts that it is entitled to summary disposition based on the "mere fact" that disciplinary action has been taken by a foreign jurisdiction without proof of the underlying misfeasance. The Committee relies on Marek to support its position.

Respondent argues that he is entitled to a full and fair hearing on the allegations against him and that not to provide him with such a hearing would violate his due process rights. The Respondent points out that he has a property interest in his medical license. Humenansky v. Minnesota Bd. of Medical Examiners, 525 N.W.2d 559, 556 (Minn. App. 1994), rev. denied (Feb. 14, 1995). A medical license is one that that rises to a heightened level of due process scrutiny. Medina v. Rudman, 545 F.2d 244, 250-51 (1st Cir. 1976), Appeal of Plantier, 494 A.2d 270, 273 (N.H. 1985). Respondent also asserts that disciplinary decisions in foreign jurisdictions should not be given preclusive effect in Minnesota, citing the case of Halyalkar v. Board of Regents, 527 N.E.2d 1222 (N.Y. 1988) to support his position.

It is undisputed that Respondent has a property interest in his medical license. However, one purpose of Minn. Stat. § 147.091, subd. 1(d), is to avoid the need for the Board to re-establish the grounds for disciplinary action taken in another state. As a result, the disciplinary orders issued in other states must be deemed to establish grounds for disciplinary action in Minnesota without further proof of the charges on which the other state based its disciplinary action. While the Minnesota Board must consider the charges made by California and Colorado, it need not relitigate the charges upon which the other states proceeded. It thus is appropriate to grant summary disposition with respect to the violation of § 147.091, subd. 1(d).

This approach is consistent with the Court's decision in Marek. In Marek, petitioners entered into a consent decree in Nevada. Pursuant to the consent decree the Nevada State

Board of Podiatry issued an order which revoked petitioners' licenses to practice and placed them on three years' probation upon certain terms and conditions. In the consent decree, petitioners made no admission of wrongdoing, and the Nevada Board imposed discipline pursuant to petitioners' consent, without a formal hearing.

Petitioner's then moved to California to practice podiatry. The California Medical Board filed accusations against both petitioners alleging that petitioners had engaged in unprofessional conduct based upon the Nevada consent decree. The California Board sought to revoke the license of each physician. The California Board based the revocation on California's Business and Professions Code section 2305 which provided: "The revocation, suspension, or other discipline by another state of a license or certificate to practice medicine issued by the state....shall constitute grounds for disciplinary action for unprofessional conduct against such license in this state." Id. at 478.

The Court in Marek found that section 2305 requires only that the California Medical Board determine that disciplinary action by another state as to a license to practice medicine issued by that other state had occurred and that the California Board need not take evidence on or establish the factual basis for that other state's disciplinary action. A full and fair hearing as required by due process occurred as to the limited factual question of whether discipline was imposed by another state. Id. at 476.

The petitioners in Marek challenged the manner in which the California statute was applied to them. Petitioners argued that they were deprived of their constitutional due process right to a full and fair hearing on the charges because the consent decree upon which the Nevada board based its disciplinary order contained no admissions of any professional misconduct, and that the terms of the consent decree provided

that it would not be considered and admission or used for any other reason.

The Court in Marek stated that the broad language of the law does not limit its application only to professional discipline imposed after a full hearing on the merits. The statute applies by its terms to any discipline imposed by another state on the holder of a license or certificate to practice medicine issued by that state. Discipline includes the signing of a consent decree to disciplinary action without any admission of the charges brought by another state. Under the statute, the unprofessional conduct lies not in the alleged underlying misfeasance in Nevada but in the fact that discipline has been imposed by another state regarding petitioners' licenses to practice medicine in that other state. The Court further concluded that the Petitioners improperly sought to expand the scope of the law to include requirements of investigation and proof of the underlying basis for the consent decree. Id. at 479.

The Court in Marek also addressed the public policy considerations stating that it would be a physical and financial burden for a state to have to investigate the alleged conduct of a practitioner in another state and have to prove the case in its own court. In addition, if the law was limited to only situations where the licensees admit the allegation or where the misconduct is proven by hearing, it would make California a "safe haven" for other physicians who, when charged with allegations, enter into a settlement in another state, leave that state, establish medical practice in California and avoid review of their practices by the licensing agency.

This facts in this case are similar to the facts in the Marek case. Like the petitioner's in the Marek case, the Respondent entered into a consent decree that was disciplinary in nature. The Respondent then moved to another state that sought to impose discipline based on the prior disciplinary action. The California and the Minnesota statutes are similar and dictate

that the same result should occur in this case. Therefore, the Administrative Law Judge concludes that permitting disciplinary action in Minnesota based solely on the fact of disciplinary action in California and Colorado is consistent with the purpose of Minn. Stat. § 147.091, subd. 1(d) to protect the state's citizens by regulation of the professional conduct of its physicians.

This case is distinguishable from Halyalkar which involved the issue of collateral estoppel. Halyalkar was a case in which a physician entered into a consent order in New Jersey by pleading guilty to misconduct leading to the suspension of his license. The New York Office of Professional Medical conduct, sought to use the New Jersey consent order as the sole basis for punishing petitioner in a separate proceeding commenced to revoke or suspend his license in New York. However, in Halyalkar, the State of New York, in its disciplinary proceedings relied on the factual findings by the New Jersey board and on facts contained in the consent decree.

Here, as in Marek, Respondent is not being charged with the allegations that were charged in California and Colorado, but with the fact that there had been a prior disciplinary action in another state. The Minnesota Medical Board, does not have to relitigate the issues of the other states, it may impose discipline based on the prior consent orders alone under Minn. Stat. § 147.091, subd. 1(d).

The opportunity for the Respondent to challenge the underlying allegations of California and Colorado was at the time the allegations were pending in those states. Respondent, in both cases, had an opportunity for a full and fair hearing in each state. However, according to the stipulations, Respondent willingly and knowing waived the rights to any hearing that he may have had regarding those allegations.

Finally, Respondent contends that disciplinary proceedings against the Respondent are barred by due process

notions of timeliness and the doctrine of laches. Respondent argues that the Committee has known of the California allegations, and their resolution, for over six years and that the allegations are over twelve years old. The Respondent contends that there is no explanation for the four year time lapse between the Committee's investigation and the inception of negotiations over the terms and conditions of the proposed Stipulation and Order. Respondent alleges that he will be prejudiced in the support of his defense because memories surrounding the allegations will have faded and witnesses will be difficult, it not impossible. to locate.

It is established in Minnesota that "laches has been available against the state when acting in its proprietary capacity, but not when acting in its sovereign capacity." City of Staples v. Minnesota Power & Light Co., 196 Minn. 303, 306, 265 N.W. 58, 60 (1936), Leisure Hills of Grand Rapids v. Minnesota Department of Human Services, 480 N.W.2d 149, 151 (Minn. App. 1992)

It is not disputed that the Committee is acting in its sovereign capacity in this matter. Furthermore, Respondent has not shown that the delay has prejudiced his case. As previously stated, this is not a case where witnesses will have to testify. Here, the Board will decide what, if any, discipline to impose based on the prior consent orders. Testimony will not have to be taken to prove the underlying allegations in either California or Colorado. Moreover, Respondent can argue to the Board that the lack of any complaint since 1989 mitigates in favor of some lesser discipline. Therefore, Respondent has not established that his case had been prejudiced by the amount of time that as passed. Therefore, dismissal based on laches is inappropriate.

SMM

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA BOARD
OF MEDICAL PRACTICE

In the Matter of the Medical License of Robert W. Tatreau, M.D. License No. 21,662	**ROBERT W. TATREAU, M.D.'S MEMORANDUM IN OPPOSITION TO COMPLAINT REVIEW COMMITTEE'S MOTION FOR SUMMARY DISPOSITION**

INTRODUCTION

Doctor Robert W. Tatreau is a physician licensed to practice medicine in the State of Minnesota. He has practiced in this State, without complaint or incident, since 1989. Despite Dr. Tatreau's spotless record of performance in this State, the Complaint Review Committee now seeks to discipline him on the basis of his decision to voluntarily surrender his medical licenses in California and Colorado.

The Committee's Motion for Summary Disposition comes over six years after it learned of all relevant facts and circumstances surrounding Dr. Tatreau's decision to voluntarily surrender his licenses -- and over twelve years after the incidents giving rise to those proceedings. The Committee seeks to discipline Dr. Tatreau even in the absence of a hearing on the merits of the incidents alleged in the complaint. The Committee's motion is unsupported by law, fact, or reason and directly violates Dr. Tatreau's due process property right in his medical license. The Committee's Motion for Summary Disposition should be denied.

STATEMENT OF FACTS

The Committee's Motion for Summary Disposition centers on allegations that Dr. Tatreau engaged in unprofessional conduct in the State of California in 1983 and 1984. At that time, Dr. Tatreau was practicing primarily at Sierra Vista Hospital in San Luis Obispo, California. See Affidavit of Robert W. Tatreau (Feb. 5, 1996) ("Tatreau Aff.") (Exh. A). He also practiced occasionally at San Luis Obispo General Hospital. Id.

As a result of several dubious allegations of professional incompetence, Sierra Vista Hospital summarily suspended Dr. Tatreau's privileges in May, 1984. Id. Shortly thereafter, San Luis Obispo General Hospital also removed Dr. Tatreau's privileges on the basis of Sierra Vista's action. Id. There were no additional allegations of misconduct at that facility. Id.

In February 1985, Dr. Tatreau moved to Canon City, Colorado and obtained full Ob/Gyn privileges at St. Thomas Moore Hospital. Id. Dr. Tatreau practiced at St. Thomas Moore Hospital for approximately three years. Id. During that time he earned the admiration and respect of his colleagues for his professional treatment of patients at that facility. There are no allegations of professional misconduct against Dr. Tatreau stemming from his practice in Colorado.

In September of 1988, Dr. Tatreau moved to Minnesota to care for his mother, who had become ill with cancer. Id. Dr. Tatreau continues to reside in Minnesota and has practiced medicine here since 1989. Id. There are no allegations of professional misconduct during Dr. Tatreau's seven-year practice in this State.

Since his departure from California and Colorado, Dr. Tatreau has voluntarily surrendered his license to practice medicine in those states. On December 27, 1988, Dr. Tatreau entered into a stipulation with the Board of Medical Quality

Assurance of the State of California pertaining to the voluntary surrender of his license in that state. See Exh. A to Committee Mem.[1] The California stipulation explains that at the time the stipulation was entered, Dr. Tatreau was residing out of state and had no intention of practicing medicine again in California. Id. at ¶ 2. By that stipulation, all charges of professional misconduct against Dr. Tatreau were dismissed in their entirety upon his agreement to voluntarily surrender his California license. Id.

In the course of the California proceedings on the accusations against Dr. Tatreau, the Board did not prove that he engaged in any misconduct. A full and fair hearing was not held to determine whether Dr. Tatreau engaged in misconduct, and Dr. Tatreau did not admit to the accuracy of any of the allegations against him.[2] Importantly, at the time of the settlement discussions in California, Dr. Tatreau already had moved back to be with his mother, who was ill with cancer in the State of Minnesota. See Tatreau Aff. He already had determined to establish a medical practice in Minnesota and had no further use for his California license. Id. He had exhausted his financial resources and was not able to undergo the expense and unpleasantness of a contested case hearing on the charges against him. Id. For that reason, Dr. Tatreau elected not to litigate the charges against him and entered into a negotiated settlement with the State of California.

Dr. Tatreau also has voluntarily surrendered his medical license in Colorado. As the Committee argues, the allegations

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[1] Committee Mem. refers to Complaint Review committee's Memorandum in Support of Motion for Summary Disposition (Filed Jan. 12, 1996).

[2] The California stipulation did provide that Dr. Tatreau would prospectively admit to one allegation in the Complaint against him in the event that he applied for relicensure in California. Dr. Tatreau has not applied for relicensure in California and that prospective admission therefore is of no effect.

against Dr. Tatreau in Colorado stemmed from his alleged failure to report his dismissal at San Luis Obispo Hospital on his Colorado application for medical licensure. Committee Mem. at 6. The Committee fails to acknowledge in its submission to this Court, however, that Dr. Tatreau did disclose when he applied for medical licensure in Colorado that Sierra Vista Hospital -- his primary facility -- had revoked his privileges. San Luis Obispo General Hospital's action was predicated on the same alleged conduct and merely taken in reaction to Sierra Vista's discipline.

Dr. Tatreau thus informed Colorado of the substantive nature of the California charges and the basis for his discipline at both hospitals. He failed to disclose San Luis Obispo's decision to revoke his privileges simply due to oversight. Tatreau Aff. His failure to report that disciplinary action is, at absolute worse, a technical and insignificant reporting error. The alleged omission on his Colorado application is of no substantive affect.

Again, at the time of the Colorado accusations, Dr. Tatreau already had moved back to Minnesota and intended to continue his practice in this state. Id. He believed that he had no reason to incur the unnecessary expense and burden of a contested case hearing in Colorado. For that reason, in Colorado, as in California, Dr. Tatreau did not receive a full and fair opportunity to litigate the allegations at issue. He simply surrendered his license, voluntarily, rather than undergo an unnecessary and protracted dispute over spurious allegations.

The State of Minnesota and the Complaint Review Committee have been fully aware of the disciplinary action taken against Dr. Tatreau's medical licenses in Colorado and California since he first began practicing in this State in 1989. Not until January 12, 1996, however, did the committee attempt to discipline him on that basis.

The Committee has fully investigated the merits of the underlying accusations against Dr. Tatreau in Colorado and California. See Notice of Conference (Nov. 9, 1989) (Exh. B). As early as November, 1989, the Complaint Review Committee began investigating the California allegations of professional malfeasance against Dr. Tatreau. Id. On January 31, 1990, the Complaint Review Committee held a conference with Dr. Tatreau to discuss the nature of the underlying allegations and the merits of the California complaint against him. The Complaint Review Committee suggested that Dr. Tatreau undergo "retraining program" and requested all records from the cases involved in the California accusations. Dr. Tatreau sent all records involved to the Complaint Review Committee for a review by their consultant in the spring of 1990. At that time, the Complaint Review Committee promised "quick review" of the allegations and a proposed resolution to the situation.

The Complaint Review Committee took no further action against Dr. Tatreau's license for almost four years. The Committee acquiesced to Dr. Tatreau's unhindered and unrestricted treatment of patients in this state, without further comment, review or investigation, for that entire time. Obviously, during that period, the Committee did not consider Dr. Tatreau to be a risk to the health and safety of Minnesota citizens.

Nonetheless, on March 31, 1994, the Committee sent Dr. Tatreau a stipulation which requested that he admit to the substance of the allegations against him in California and consent to random audits of his practice, preapproval of his practice settings and a $2,000.00 civil penalty. See Proposed Stipulation (Exh. C). The requested stipulation was unaccompanied by any explanation for the delay, or any indication that the State of Minnesota had concern about Dr. Tatreau's practice in Minnesota. If Dr. Tatreau were to sign the stipulation requested by the Review Committee, it would

be tantamount to a resignation of his current employment. Tatreau Aff.

In all, six years have elapsed since the Review Committee first became aware of the allegations against Dr. Tatreau. Over twelve years have elapsed since the allegations giving rise to the Committee's request for disciplinary action. The Committee's Motion for Summary Disposition of the disciplinary proceedings against Dr. Tatreau -- without the opportunity for a full and fair hearing on the merits of the allegations -- is a textbook example of a due process violation.

ARGUMENT

Doctor Tatreau is entitled to a full and fair hearing on the allegations against him. First, Minnesota Statute § 147.091 Subd. 1(d), upon which the Committee relies, does not apply to a situation in which a foreign jurisdiction and a medical license holder agree to the voluntary surrender of a medical license in exchange for dismissal of pending charges. Second, even if the disposition of Dr. Tatreau's licensing proceedings in California and Colorado constitute "discipline," it is improper to accord those foreign judgments preclusive effect in this proceeding. Third, there is no mechanism provided by the Minnesota Rules for summary disposition of the disciplinary proceeding under the circumstances at issue in this case.

In addition to violating Dr. Tatreau's due process right to a full and fair hearing, the Committee's motion comes at such a late date that witnesses' memories of events and evidence pertaining to the allegations at issue have dissipated. As such, the Committee's attempt to discipline Dr. Tatreau based upon his voluntary surrender of his Colorado and California licenses is barred by the timeliness requirement of the due process clause and the doctrine of laches.

I. DOCTOR TATREAU IS ENTITLED TO A FULL AND FAIR HEARING On TEE ALLEGATIONS AGAINST HIM

A. Summary Disposition of this Proceeding Would Violate Due Process.

Doctor Tatreau has a property interest in his medical license. Padilla v. Minnesota State Bd. of Medical Examiners, 382 N.W.2d 876, 882 (Minn. App. 1986), rev. denied (Minn. Apr. 24, 1986); Humenansky v. Minnesota Bd. of Medical Examiners, 525 N.W.2d 559, 566 (Minn. App. 1994), rev. denied (Feb. 14, 1995). Dr. Tatreau's interest is entitled to constitutional protection, including due process. U.S. Const., Amend. 5; Minn.Const., Art. I, §7; Greene v. McElroy, 360 U.S. 474, 492 (1959). Indeed, a physician's interest in his medical license is so significant that it is entitled to a heightened level of due process scrutiny. Medina v. Rudman, 545 F.2d 244, 250-51 (1st Cir. 1976); Appeal of Plantier, 494 A.2d 270 (N.H. 1985).

> The private interest affected by the governmental action [in a medical license disciplinary proceeding] is substantial. The right to engage in one's occupation is a privilege of fundamental significance. At stake in a disciplinary proceeding is a physician's license to practice his livelihood and profession. The loss of a license to practice medicine after years of training and experience is certainly a grievous loss.

Appeal of Plantier, 494 N.W.2d at 273 (citation omitted).

In this case, due process requires reasonable notice, the timely opportunity for a full and fair hearing and the right to present evidence, testimony and argument. Goldberg v. Kelly, 397 U.S. 254, 267-68 (1970); Humenansky, 525 N.W.2d at

565. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Eisen v. State Dept. of Pub. Welfare, 352 N.W.2d 731, 736 (Minn. 1984) (quoting Armstrong v. Manzo, 280 U.S. 545, 552 (1965)).

The Committee seeks to circumvent Dr. Tatreau's right to a full and fair hearing on the allegations against him by arguing that Minn. Stat. § 147.091 entitles the Committee to summary disposition. Minnesota Statute § 147.091 provides that disciplinary action taken against a physician's medical license in another state or jurisdiction is grounds for disciplinary action in this state. Minn. Stat. § 147.091, Subd. 1(d). As applied to the facts of this case, however, that statute does not entitle the Committee to summary judgment.

1. Dr. Tatreau Did Not Violate Minnesota Statute § 147.091, Subd. 1(d) by Voluntarily Surrendering His Licenses in California and Colorado.

As part of a negotiated settlement of allegations in California and Colorado, Dr. Tatreau agreed to surrender his licenses in those jurisdictions in ex change for the dismissal of all charges against him. That action does not constitute "revocation, suspension, restriction, limitation or other disciplinary action against [his] medical license in another state or jurisdiction." See Minn. State § 147.091. The term "disciplinary action" is expressly defined by Minn. Stat. § 147.141. According to Minnesota Statute "disciplinary action" can take the following forms: (1) Revocation of license; (2) Suspension of license; (3) Imposition of limitations or conditions on the physician's practice of medicine; (4) Imposition of a civil penalty up to $10,000.00; (5) Supervision at a designated public hospital, clinic or other health care institution; or (6) Censure or reprimand. Minn. Stat. § 147.141. None of those "forms of disciplinary action" were

taken against Dr. Tatreau's license in either California or Colorado. Tellingly, the Minnesota Legislature does not define "voluntary surrender" of a medical license as a form of disciplinary action. Id.

The Minnesota Legislature's decision to exclude voluntary surrender from the "forms of disciplinary action" enumerated by Minn. Stat. § 147.141 is supported by sound public policy considerations. A foreign jurisdiction and a physician should be entitled to negotiate a mutually acceptable disposition of dubious allegations of professional misconduct by simply permitting the voluntary surrender of the physician's license, without subjecting him to reactionary, reciprocal disciplinary action in other jurisdictions. See Halyalkar v. Board of Regents, 527 N.E.2d 1222, 1226 (N.Y. App. 1988). It is patently unfair to suggest that, in order to avoid disciplinary action in Minnesota, Dr. Tatreau would be required to travel back to California and Colorado and incur the expense and inconvenience of a full contested case hearing on the allegations against him in both of those jurisdictions. Id. The Committee's interpretation of Minn. Stat. § 147.091 is particularly unreasonable in light of the fact that Dr. Tatreau already had abandoned his practices in California and Colorado and determined that his license in those jurisdictions was no longer of importance to him.

Additionally, the Committee's argument ignores the fact that both California and Colorado had the authority to subject Dr. Tatreau to actual discipline, rather than accepting the voluntary surrender of his license. See, e.g., Cross v. Board of Dental Examiners, 552 P.2d 38, 40 (Colo. App. 1976), cert. denied (July 12, 1976) (voluntary surrender of license does not divest Board's jurisdiction of ability to discipline professional). If California or Colorado had wanted to revoke Dr. Tatreau's license, or subject him to other forms or discipline on the basis of the allegations against him in those states, they could have done so only upon a full and fair hearing on the merits of the

allegations. Those states, however, voluntarily elected to forego disciplinary proceedings, and dismiss all charges against Dr. Tatreau, in exchange for the voluntary surrender of his license. If Dr. Tatreau were aware that the negotiated disposition of the Colorado and California proceedings would affect his ability to practice medicine in Minnesota, he never would have agreed to surrender his license and would have subjected both himself and those states to the expensive and time consuming contested case hearing process.

The Committee relies on a number of inapposite cases from other jurisdictions in support of its argument that voluntary surrender of a license constitutes discipline within the meaning of Minn. Stat. § 147.091. Both Cross, 552 P.2d at 40, and Davidson v. D.C. Board of Medicine, 562 A.2d 109 (D.C. 1989), held that professionals could not evade disciplinary action by voluntarily surrendering their licenses. The professionals in both Cross and Davidson sought to avoid the effect of strict disciplinary action and monetary fines by surrendering their license and depriving the board of jurisdiction over them. It is of little surprise that the courts in Cross and Davidson did not approve that maneuver.

Doctor Tatreau's situation, however, is completely distinct. In Dr. Tatreau's case, the medical boards in Colorado and California negotiated the voluntary surrender of his license, rather than subjecting him to discipline. Indeed, the California Board proposed that resolution. Dr. Tatreau did not dispute the Boards' jurisdiction over him or their ability to enter formal disciplinary action, if he were adjudicated guilty at a contested case hearing. Unlike the situations at issue in the cases cited by the Committee, both Colorado and California elected to forego full disciplinary hearings and accept the voluntary surrender of his license.

2. Disciplinary Decisions in Foreign Jurisdictions Should Not Be Given Preclusive Effect in Minnesota.

The mere fact of discipline in another jurisdiction does not invoke the Board's disciplinary authority in Minnesota. The facts and circumstances of Dr. Tatreau's voluntary surrender of his Colorado and California licenses do not invoke the Board's disciplinary authority without a full and fair hearing on the merits of the allegations in those jurisdictions. See Halyalkar v. Board of Regents, 527 N.E.2d 1222 (N.Y. 1988). In Halyalkar, the court held that decisions from foreign jurisdictions should not be accorded preclusive effect in disciplinary proceedings unless it appears from the record that the allegations were fully and fairly litigated in the foreign jurisdiction. In Halyalkar, the physician had entered a plea of guilty to various allegations pending against him before the New Jersey Board of Medical Examiners. Id. at 1223. He received three months active suspension of his license and a $2,500.00 fine. Id. Notwithstanding the disciplinary action taken against the physician in New Jersey, the court concluded that he could not disciplined in New York without a hearing on the merits of the allegations. Id. at 1225-26.

The court held that to apply a preclusive effect to decisions of other jurisdictions would discourage compromise and settlement and accord disciplinary proceedings in other states "consequences which the parties neither intended nor foresaw." Id. at 1226. The court noted that physician had simply pled guilty to the charges by mail, had not actively contested the New Jersey proceedings due to expense and his desire to practice elsewhere, and had not had a full and fair opportunity to litigate the charges against him in New Jersey. Id. at 1225. The court explained that "[a]llowing this administrative consent order to have preclusive effect would,

in our view, give an effect neither justified by its language nor the circumstances surrounding its signing."[3]

The Committee, however, argues that the mere fact of discipline in other jurisdictions invokes its disciplinary authority. Committee Mem. at 7-10. In particular, the Committee relies at length on an inapposite and ill-reasoned decision of an intermediate California appeals court. Marek v. Board of Podiatric Medicine, 20 Cal. Rep. 2d 474, 477-80 (Cal. App. 2 Dist. 1993), rev. denied (Cal. Sept. 16, 1993). In Marek, the court held that two physicians were subject to discipline in California on the basis of their license revocation in Nevada.[4] Marek, however, involves clear disciplinary action as opposed to voluntary surrender of a license. Id. at 477. Additionally, Marek was premised on a number of policy considerations, regurgitated by the committee in its memorandum, that have no application to this proceeding. In particular, Marek expressed concern over "the financial task of investigating allegations of misconduct" and concerns that California would become "a safe haven" for incompetent medical practitioners. Neither of those concerns are applicable to this case.

First, Minnesota already has undertaken the burden of investigating the allegations of misconduct against Dr. Tatreau

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[3] Halvalkar is consistent with Minnesota decisions regarding the preclusive effect of earlier decisions. See, e.g. AFSCNE Counsel No. 14 v. Washington County Board, 527 N.W.2d 127, 130-31 (Minn. App. 1995) ("[i]ssues not fully adjudicated are not subject to collateral estoppel"); Matter of Welfare of D.M.D., 438 N.W.2d 713, 715 (Minn. App. 1989) (issue preclusion should be applied flexibly, with a focus on whether it would work an injustice against the party sought to be estopped).

[4] Marek attempted to distinguish Halvalkar on the grounds that a statute was involved, rather than collateral estoppel. 20 Cal. Rep. 2d 480. Marek's reasoning is unpersuasive as applied to this case. The same equitable factors considered by the Halvalkar court apply with equal force to a due process inquiry.

in California. Indeed, Dr. Tatreau met with the Committee, disclosed all pertinent records, and the Committee took no action on the basis of those records for a period of almost four years. The Committee now moves for summary judgment, not because of concerns over the financial burden of investigating the allegations against Dr. Tatreau, but because it can advance no credible evidence in support of those allegations.

Second, this is not a case where Dr. Tatreau moved to Minnesota to practice medicine after being kicked out of California and Colorado. He had moved to Minnesota before disciplinary action in California and Colorado even was commenced, let alone resolved. Tatreau Aff. He moved back here with the intention of caring for his terminally ill mother and establishing a medical practice in Minnesota. Id. The Committee has not presented, and cannot present, any evidence of professional misconduct during Dr. Tatreau's seven-year period of practice in this state. Disciplinary action on the basis of antiquated allegations in other jurisdictions, without even the opportunity for a full and fair hearing on the merits, would be a clear violation of due process.

3. The Committee Is Not Entitled to Disposition Without a Full and Fair Hearing.

There is no provision of Minn. Stat. § 147.091 or the Minnesota Rules for contested case hearings that permits the Committee to obtain summary disposition of disciplinary action. Even if the Committee were correct that Dr. Tatreau's voluntary surrender of his license constituted disciplinary action in another state, and even if it were correct that foreign disciplinary action is entitled to preclusive effect in Minnesota, Dr. Tatreau still would be entitled to a hearing as to whether discipline is appropriate under the facts and circumstances of his case.

One of the fatal flaws in the Committee's reasoning is its erroneous assumption that any violation of Minn. Stat. § 147.091, Subd. 1, no matter how technical, subjects a physician to discipline per se. In fact, however, some violations of Minn. Stat. § 147.091, Subd. 1, although providing a "grounds" for discipline, may be so insignificant in comparison to the physician's many years of unblemished public service, that disciplinary action is not warranted. Thus, even if Dr. Tatreau's voluntary surrender of his California and Colorado licenses can fairly be considered a violation of Minn. Stat. § 147.091, Subd. 1(d), he is entitled to a hearing to determine whether that technical violation, in the context of the underlying allegations and his long history of spotless performance and public service in the State of Minnesota, justifies disciplinary action. Indeed, even in the California Appeals Court's draconian decision in Marek, the respondents were given a hearing and the opportunity to present evidence as to their competence, qualifications and the quality of care they provided in that state. 20 Cal. Rep. 2d at 481.

B. Disciplinary Proceedings Against Dr. Tatreau Are Barred by Due Process Notions of Timeliness and the Doctrine of Laches.

Even where a particular cause of action is not subject to a Statutory limitations period, the due process clause of the Fifth Amendment guards against long delays in judicial proceedings. United States v. Lovasco, 431 U.S. 783, 790 (1977); State v. Huddock, 408 N.W.2d 218, 221 (Minn. App. 1987). Due process notions of timeliness are applicable to administrative and disciplinary proceedings. Eisen, 352 N.W.2d at 737; see also Matter of Schroeder,, 415 N.W.2d 436, 441 (Minn. App. 1987) (rejecting psychologist's due process challenge to disciplinary proceedings brought two years after incident because there was no evidence as to when

the Board received the complaint). If a respondent can demonstrate that delay in prosecution of a disciplinary proceeding prejudiced his defense and was not supported by a proper state purpose, the disciplinary proceeding is barred by due process and laches. See Fitzgerald v. Commissioner of Pub. Safety, 356 N.W.2d 843, 845 (Minn. App. 1984); Appeal of Plantier, 494 A.2d at 273.

In Plantier, the New Hampshire Supreme Court struck down disciplinary proceedings against a physician's license based on a complaint originating nine years prior to the proceedings. Appeal of Plantier, 494 A.2d at 273-75.

> It is fundamentally unfair to make a physician defend a nine year old complaint when the complaint was not delayed by fraud or the lack of ability to discover the misconduct.

Id. at 275.

In this case, the Committee's proposed action is even more fundamentally unfair than the situation in Plantier. The Committee has known of the California allegations, and their resolution, for over six years. The allegations at issue are more than twelve years old. Understandably, memories have faded and witnesses will be difficult, if not impossible, to locate.

Further, there is no explanation for the Committees six year delay in bringing this action. The Committee met with Dr. Tatreau regarding the substance of the allegations at issue in California in January, 1990. Dr. Tatreau provided all pertinent records in April of 1990. Inexplicably, it then took four years for the Committee to take any action in regard to Dr. Tatreau's case.

The Committee attempts to explain the delay as "an extensive period of negotiation." Committee Mem. at 1. In fact, however, there was no negotiation regarding disciplinary

proceedings until March 31, 1994 -- when the Committee forwarded Dr. Tatreau a Stipulation and Order for his signature. There is no explanation for the four year time lapse between the Committee's initial investigation and the inception of negotiations over the terms and conditions of the proposed Stipulation and Order.

More important, all of the investigation and negotiation to which the Committee refers in an effort to explain its six year delay in action pertains to the substance of the underlying allegations against Dr. Tatreau in California. All of the Committee's actions prior to this motion had focused -- appropriately -- on the substance of the allegations. So should these proceedings.

The Committee has slept on any rights it may have had against Dr. Tatreau in 1990. It should not, and by the principles of due process and laches, cannot, now be heard to argue that it is entitled to discipline Dr. Tatreau on the basis of antiquated allegations in the absence even of a hearing on the merits.

CONCLUSION

For the foregoing reasons, Respondent Robert W. Tatreau, M.D., respectfully requests that this court deny the Complaint Review committee's Motion for Summary Disposition.

Respectfully Submitted,
MESHBESHER BIRRELL
& DUNLAP, LTD.

Dated: 2/5/96 By s/Ian A.J. Pitz

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STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA BOARD
OF MEDICAL PRACTICE

In the Matter of the Medical License of Robert W. Tatreau, M.D. License No. 21,662	**AFFIDAVIT OF ROBERT W. TATREAU, M.D.**

I, Dr. Robert W. Tatreau, M.D. being first duly sworn on oath, hereby state as follows:

1. My name is Robert W. Tatreau. I am a physician licensed to practice medicine in the State of Minnesota.

2. In the spring of 1983, I practiced medicine in San Luis Obispo, California. At the time, I was licensed to practice medicine in the State of California. My primary practice was at Sierra Vista Hospital and occasionally I practiced at San Luis Obispo General Hospital.

3. In May of 1984, Sierra Vista Hospital suspended my privileges due, on the best of my information and belief, to personality conflicts that I had with other OB/GYN practitioners at that hospital. Shortly thereafter, and based solely upon Sierra Vista's action, San Luis Obispo General Hospital also removed my medical privileges at that facility.

4. In February of 1985, I began practicing obstetrics and gynecology in Canon City, Colorado and obtained full privileges at St. Thomas Moore Hospital. I practiced at St. Thomas Moore Hospital until October of 1987. No complaints were brought against me on the basis of my medical practice while at that facility.

5. In September of 1988, I moved to the State of Minnesota to care for my mother, who was terminally ill with

cancer. I intended at that time to establish a medical practice in the state of Minnesota.

6. In October of 1988, the California Medical Board proposed that I voluntarily surrender my license to practice medicine in that state. In exchange, they agreed to dismiss all allegations of misconduct pending against me. Because I had no intention of practicing medicine in California again, I agreed to that disposition of the matter. At the time I agreed to that negotiated settlement, I was under the impression that the voluntary surrender of my license did not constitute discipline and would not subject me to additional disciplinary proceedings in other jurisdictions.

7. In November of 1988, I agreed to enter into a stipulation with the Colorado Medical Board to dismiss allegations of unprofessional conduct in exchange for voluntary surrender of my license in that state. I agreed to that disposition because I did not have the financial resources or incentive to fight to keep my license in Colorado. I already had moved back to Minnesota at that time and intended to practice here. I did not believe that voluntary surrender of my license in Colorado would subject me to discipline in the State of Minnesota.

8. If I had been aware at the time of the negotiated settlements in California and Colorado that voluntary surrender of my license in exchange for dismissal of allegations of unprofessional misconduct would subject me to discipline in the State of Minnesota, I would not have agreed to surrender my license and would have exercised my right to a full and fair hearing on the allegations against me.

Dated: 2-5-96

s/s
Robert W. Tatreau, M.D.

COUNTY OF HENNEPIN)
) ss.
STATE OF MINNESOTA)

Subscribed and sworn to
before me this 5th day
of February, 1996.

s/Nichole R. Dorschner
Notary Public

Supreme Court, U.S.
FILED
APR 15 1997
OFFICE OF THE CLERK

No. 96-1477

In The

Supreme Court of the United States

October Term, 1996

ROBERT W. TATREAU,

Petitioner,

vs.

ROBERT A. LEACH, Executive Director of the Minnesota Board of Medical Practice,

Respondent.

On Petition For Writ Of Certiorari To The Minnesota Court Of Appeals

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Did the imposition of discipline upon Petitioner's medical license on the basis of a reciprocal statute which allows Minnesota to discipline a physician based on another state's disciplinary action violate Petitioner's procedural due process rights?

II. Did the exclusion of testimony and evidence relating to mitigation belatedly offered after the close of the hearing record violate Petitioner's procedural due process rights?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests that the Court deny the petition for writ of certiorari seeking review of the decision of the Minnesota Court of Appeals in this case. That opinion (Pet. App. A-2 - A-9) is not reported.

STATEMENT OF THE CASE

Petitioner has been licensed by the Minnesota Board of Medical Practice since 1974. Pet. App. A-16. Concurrent with his Minnesota licensure, Petitioner has also held medical licenses in the states of California and Colorado. *Id.*

On June 24, 1986, January 9, 1987, and April 26, 1988, the Board of Podiatric Medicine, Medical Board of California, Department of Consumer Affairs ("the California Board") filed accusations against Petitioner, charging him with unprofessional conduct based on acts of gross negligence and incompetence in the performance of his duties as a physician. *Id.* These accusations were resolved in March 1989 when Petitioner entered into a "Stipulation in Settlement" with the California Board which required him to surrender his license and to waive any right to renewal or reinstatement of the license except by board order. Pet. App. A-17.

On January 18, 1989, the Colorado State Board of Medical Examiners entered into a "Stipulation and Order" with Petitioner which required him to surrender his medical license based on fraud, misrepresentation, or

deception in obtaining his Colorado medical license. Pet. App. A-16.

On January 31, 1990, the Minnesota Board, acting through its Complaint Review Committee, ("Committee")[1] held a disciplinary conference with Petitioner to discuss the actions taken by the California and Colorado boards. Pet. App. A-18. The Committee determined that Petitioner had been disciplined by the California and Colorado medical boards and that those actions were grounds for disciplinary action in Minnesota pursuant to Minn. Stat. § 147.091, subd. 1(d).[2]

After a lengthy period of unsuccessful settlement negotiations, an administrative proceeding was initiated pursuant to Minn. Stat. Chapter 14, the Administrative Procedure Act.[3] Pet. App. A-4. Significantly, the Committee did not plead its case under the statutory provisions

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[1] A committee made up of Board members acts on behalf of the Board in prosecuting complaints. The Committee members act independently of the full board and do not participate in Board decisions in the matter. Minn. Stat. § 214.103, subds. 5, 6 and 7 (1996).

[2] Minn. Stat. § 147.091, subd. 1(d) provides as follows:

> . . . The following conduct is prohibited and is grounds for disciplinary action:
>
> . . . .
>
> (d) Revocation, suspension, restriction, limitation, or other disciplinary action against the person's medical license in another state or jurisdiction . . .

[3] Under Minnesota's APA, an administrative law judge conducts the hearing and makes a recommendation of facts and conclusions to the agency decision maker, here the Board of Medical Practice. Minn. Stat. § 14.62 (1996). The board, as decision maker, considers argument but does not take

which authorize disciplinary action based on unprofessional or unethical conduct, although these categorizations of Petitioner's conduct are certainly descriptive of the conduct underlying the California and Colorado disciplinary violations. Instead, the Committee pled its case under Minn. Stat. § 147.091, subd. 1(d), which predicates disciplinary action upon the fact of discipline having been taken by another state or jurisdiction. *Id.* During the course of this litigation, the Committee sought summary disposition based on the undisputed fact that discipline had been imposed against Petitioner's license in another jurisdiction.[4] *Id.* Petitioner was sent a Notice of Motion and Motion For Summary Disposition on January 12, 1996. Petitioner submitted a responsive Memorandum on February 5, 1996. Pet. App. A-30.

At the February 9, 1996 motion hearing, Petitioner's argument did not include a request to present mitigating evidence, although Petitioner did include such evidence by means of affidavit. Pet. App. A-47. Instead, Petitioner argued that he was entitled to a hearing on the underlying conduct which formed the basis of the California and Colorado disciplinary actions. Pet. App. A-30.

On March 6, 1996, the administrative law judge issued his report which included a recommendation that the Committee's motion for summary disposition be granted. Pet. App. A-14. On May 11, 1996, a hearing was

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additional evidence into the record before rendering the final agency decision. Minn. Stat. § 14.60 (1996).

[4] Summary disposition under Minnesota's APA is the administrative equivalent to summary judgment and the same standards apply. Minn. R. 1400.6600 (1996).

held before the full Board of Medical Practice. Pet. App. A-10. Petitioner, through counsel, was allowed to argue his case at this hearing. Because the administrative hearing record had been closed, however, Petitioner was not allowed to present extra-record documentation and affidavits to the Board.

Like both the California and Colorado boards, the Minnesota Board also decided to impose discipline against Petitioner's license to practice medicine. The Minnesota Board based its action on the fact of discipline having been taken by other states, pursuant to Minn. Stat. § 147.091, subd. 1(d). Pet. App. A-10. Although both California and Colorado imposed the ultimate sanction against Petitioner depriving him of his license to practice medicine in those states, the Minnesota Board issued a disciplinary order which merely reprimanded Petitioner and required that he secure Board authorization and a pre-approved practice setting before commencing practice in the areas of obstetrics and gynecology. *Id.*

REASONS FOR DENYING THE PETITION

A writ of certiorari should not issue because Petitioner has failed to show that the Minnesota Court of Appeals' decision conflicts with the decision of any other court or that it involves an important federal question. Consequently, this case does not warrant review by this Court.

I. THE DECISION OF THE MINNESOTA COURT OF APPEALS THAT DUE PROCESS DOES NOT PRECLUDE A STATE REGULATORY BOARD FROM IMPOSING DISCIPLINE BASED ON THE FACT THAT THE PROFESSIONAL WAS DISCIPLINED IN ANOTHER STATE DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT.

In this case, the Minnesota Court of Appeals upheld the imposition of discipline against a regulated professional following adverse action taken by another state. The subsequent disciplinary action was taken on the basis of a reciprocal statute which allowed disciplinary action to be based on the fact of discipline having been imposed by another state or jurisdiction. The operative Minnesota statute provides:

> The following conduct is prohibited and is grounds for disciplinary action:
>
> . . . .
>
> (d) Revocation, suspension, restriction, limitation, or other disciplinary action against the person's medical license in another state or jurisdiction. . . .

Other courts facing similar due process challenges to disciplinary actions based on reciprocal statutes have, like the Minnesota Court of Appeals, rejected the challenges.

Two of the cases cited by Petitioner, *Marek v. Board of Podiatric Medicine*, 20 Cal. Rptr. 2d 474 (Cal. Dist. Ct. App. 1993), and *Butts v. Wyoming State Bd. of Architects*, 911 P.2d 1062 (Wyo. 1996), demonstrate the harmony among the lower courts which have looked at this issue. The

imposition of discipline in *Butts* and *Marek* was premised on the same type of reciprocal statute at issue in this case.[5] Both cases rejected the notion that a regulatory agency must investigate and prove the underlying basis for another state's disciplinary action prior to taking its own disciplinary action pursuant to a reciprocal statute. Two Pennsylvania decisions not cited by Petitioner have also reached the same due process conclusion when disciplinary action has been premised on a reciprocal statute. *See Johnston v. State Board of Medical Education and Licensure*, 410 A.2d 103 (Pa. Commw. Ct. 1980); *Soenhair v. Department of State, Bureau of Professional and Occupational Affairs*, 459 A.2d 877 (Pa. Commw. Ct. 1983).

The cases cited by Petitioner which reach a different result do so not because due process prohibits discipline

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[5] The Wyoming statute at issue in *Butts* provides:

> (a) The board may take disciplinary actions, singularly or in combination, against a licensee upon a finding of:
>
> . . . .
>
> (vii) Suspension or revocation of licensure by another state;. . . .

The California statute at issue in *Marek* provides:

> **Cal. Bus. & Prof. § 2305. Suspension or revocation by another state or federal government**
>
> The revocation, suspension, or other discipline by another state of a license or certificate to practice medicine issued by the state, or the revocation, suspension, or restriction of the authority to practice medicine by any agency of the federal government, to a licensee under this chapter shall constitute grounds for disciplinary action for unprofessional conduct against such licensee in this state.

based on a reciprocal statute, but because a different issue is involved – applying collateral estoppel principles to affirmatively prove incidents of misconduct. In *Halyalkar v. Board of Regents*, 527 N.E.2d 1222 (N.Y. 1988), the regulatory board did not proceed under a statute such as Minn. Stat. § 147.091, subd. 1(d) which provides that another state's disciplinary action is a basis for discipline. Instead, the board attempted to prove actual misconduct – knowing and willful misconduct – through the summary mechanism of producing another state's disciplinary order, notwithstanding a subsequent finding by that other state's hearing examiner that Halyalkar was not guilty of any knowing or willful misconduct. In sum, the *Halyalkar* case involved the offensive use of collateral estoppel to prove specific incidents of misconduct. As such, the *Halyalkar* case is not in conflict with the present matter, which neither depends upon collateral estoppel principles nor was pled so as to require proof of the specific misconduct occurring in other states.

Petitioner also cites *Selling v. Radford*, 243 U.S. 46 (1917), and *In re Ruffalo*, 390 U.S. 544 (1968), asserting that these federal disbarment cases demonstrate a conflict with the present case. However, it is the substantive law which dictates the result in these cases, not conflicting due process principles.

The juxtaposition of state and federal disbarment proceedings is the premise for the *Selling* and *Ruffalo* cases. This context is critical because it is the attempt to summarily impose a state court disbarment result upon a federal court disbarment action which leads to the due process result in each case. As established in *Selling* and relied upon subsequently, this Court reserves for itself

decisions regarding "fitness to practice" for purposes of the federal bar. While state court actions bearing on the issue are entitled to respect, they are not conclusively binding on federal courts. *See Theard v. United States*, 354 U.S. 278, 281-82 (1957). Since Petitioner's case involves the use of one state regulatory agency's result by another state and is grounded in the substantive state law applicable to physician disciplinary matters, the *Selling* and *Ruffalo* decisions are inapplicable. These cases reflect the disciplinary standard that the federal courts have adopted, which does not impose discipline on a reciprocal basis. Neither case holds that due process precludes use of a reciprocal discipline standard if a state chooses to do so.

Likewise, *In re Thies*, 662 F.2d 771 (D.C. Cir. 1980), involves federal disbarment principles not at issue in this case and therefore presents no conflict with the decision below. *Thies* rejects a conclusive finding of "unfitness to practice" based solely on a felony conviction, when the conduct underlying that conviction may or may not bear on the fitness to practice issue – a premise distinct from the due process issue raised in this case.[6]

Thies is significant to this case, however, in that it illustrates that due process does permit both the approach used in the federal disbarment cases and the approach used by states that employ reciprocal discipline

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[6] In a footnote to the *Thies* decision, the court notes that the sentencing judge characterized the conduct underlying Thies' conviction as a "kindergarten shouting and pushing match," and concluded that "a five hundred dollar fine would be sufficient punishment. . . . " *In re Thies*, 662 F.2d at 772, n.5.

standards. Thies was a New York attorney who was disbarred without a hearing following his felony conviction for assaulting a federal officer. While the *Thies* decision is focused on the subsequent disciplinary action taken by the Federal Tax Court, it is the state's disbarment procedure which is analogous to the disciplinary action taken by the Minnesota Board. This state proceeding is referenced with approval in a footnote in the decision.

The state disbarment proceeding was accomplished without a hearing and was based on the sole ground that the New York Judiciary Law mandated automatic disbarment upon any felony conviction. *In re Thies*, 662 F.2d. at 772. In a footnote, the court comments on the procedures used in the state disciplinary proceeding, stating that these procedures "may well be adequate" for enforcing the New York Judiciary Law. Despite this acknowledgement of the adequacy of the New York procedures under its substantive reciprocal discipline scheme, the court concluded that under the different substantive rule regarding federal disbarments, before a federal court gives conclusive effect to a state court's finding of "unfitness to practice," due process guarantees have to be in place. *Id.* at 773 n.15. The court ruled that because federal court disbarment is considered "quasi-criminal" in nature, a heightened due process standard applied that imposed more stringent procedural requirements than were necessary under New York's reciprocal law.

Not only has Petitioner failed to find cases in genuine conflict with the present matter, but despite his claim of confusion in the courts Petitioner has only cited a handful of cases spanning almost 20 years which deal with the issue at all. Obviously, courts are not confused about the

due process principles applicable to regulatory action based on the type of reciprocal statute at issue in this case.

II. THERE IS NO ISSUE CONCERNING MITIGATING EVIDENCE THAT WARRANTS REVIEW.

Petitioner argues that he was denied a due process right to present all of the mitigating evidence he believed relevant to his case, and that this denial is in conflict with decisions from this Court. However, Petitioner's cited authority does not support the proposition that there is a due process right to present mitigating evidence in administrative disciplinary proceedings.

Petitioner relies upon *Green v. United States*, 365 U.S. 301 (1961), and *Groppi v. Leslie*, 404 U.S. 496 (1972), to support his due process argument concerning mitigating evidence. *Green* is a criminal case which asserts the proposition that prior to a court's imposition of punishment, a defendant should be allowed to speak in his own behalf. Of course, Petitioner's matter is not criminal in nature and the rules that apply to an administrative imposition of discipline by a regulatory agency differ from those which must be observed in a criminal matter. As the Minnesota Court of Appeals has established, disciplinary action imposed upon a health professional in Minnesota does not constitute "punishment" but is remedial action. *Padilla v. Minnesota State Bd. of Medical Examiners*, 382 N.W.2d 876, 887 (Minn. Ct. App. 1986).

Likewise, *Groppi* involves the imposition of punishment – imprisonment on the basis of a legislative contempt finding – upon an exercise of summary contempt

authority, without allowing the accused notice or opportunity to answer. Again, because of the punishment aspect of the case and further because unlike *Groppi*, this Petitioner was allowed notice and opportunity to be heard, *Groppi* is inapplicable to the present matter and does not demonstrate a conflict in authority.

Similarly, neither of the lower court decisions cited by Petitioner hold, or even suggest, that there is a due process right to introduce mitigating evidence in an administrative disciplinary proceeding. Both decisions cited by Petitioner merely mention the fact that mitigating evidence was presented by the professional, but do not state a due process issue with respect to that mitigating evidence. *See Marek v. Board of Podiatric Medicine*, 20 Cal. Rptr. 2d 474 (Cal. Dist. Ct. App. 1993) and *Butts v. Wyoming State Bd. of Architects*, 911 P.2d 1062 (Wyo. 1996).

Like the professionals in *Marek* and *Butts*, Petitioner was allowed to present mitigating evidence to the decision maker. Consequently, this matter does not state a due process issue based on a complete deprivation of the opportunity to present mitigating evidence. Instead, Petitioner's complaint is that he was not allowed to belatedly bolster the amount of mitigating evidence in the record.

Petitioner's opportunity to present mitigating evidence was at the administrative hearing on the Committee's Motion for Summary Disposition. This Motion hearing was appropriately noticed and Petitioner defended against it by submitting a legal memorandum and affidavit and by providing oral argument. What Petitioner was not allowed to do, however, was to supplement the hearing record with affidavits and testimony

offered after the administrative law judge had closed the hearing record. This evidentiary ruling is consistent with Minnesota APA requirements.[7] Petitioner cannot establish a conflict by the facts presented in this case. Petitioner can only assert a result he finds disappointing.

CONCLUSION

For the reasons provided above, Petitioner cannot demonstrate the direct and apparent conflict necessary to support a grant of certiorari. Accordingly, Respondent respectfully requests that the petition be denied.

Dated: April 15, 1997

Respectfully submitted,

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[7] Minn. Stat. § 14.60 provides that no factual information or evidence shall be considered in the determination of the case unless it is part of the record in the contested case proceeding.